



June 29, 2000

Mr. Bruce P. Sadler
Assistant District Attorney
47th Judicial District of Texas
501 Fillmore, Suite 1A
Amarillo, Texas 79101-2449

OR2000-2469

Dear Mr. Sadler:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 136564.

The District Attorney for the 47th Judicial District (the “district attorney”) received a request for the district attorney’s entire file relating to a specified criminal case involving a homicide. The requestor is an attorney who represents the widow of the crime victim. You inform us that you have released some of the responsive information. You claim that the district attorney may withhold other responsive information under sections 552.101 and 552.108 of the Government Code. You inquire whether the requestor has a special right of access to certain other information that relates to the crime victim. We have considered the exceptions you claim and have reviewed the information you submitted.¹

¹You state that, as it is your opinion that the documents contained in your Exhibits “N,” “O,” and “P” are not subject to disclosure under chapter 552 of the Government Code, “I am not seeking an opinion from your office concerning [those] documents.” Chapter 552 of the Government Code does not authorize you to make that decision. Section 552.301 of the Government Code provides in relevant part:

A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the exceptions [to disclosure] under Subchapter C *must ask for a decision from the attorney general about whether the information is within that exception* if there has not been a previous determination about whether the information falls within one of the exceptions.

Gov’t Code § 552.301(a) (emphasis added). Thus, except in rare instances, a governmental body that receives a request for information that it believes to be excepted from disclosure must obtain a decision from this office as to whether the governmental body must or may withhold that information from the public. *See also* Open Records Decision No. 665 at 2 n.5 (2000) (addressing distinction between mandatory and discretionary exceptions to disclosure). You have not advised us of any previous determination that was made by this office with regard to any of the requested information that you seek to withhold. Accordingly, we address your exceptions to disclosure and determine whether any of the information in question is excepted from disclosure.

-- Initially we note that the submitted documents contain information that is subject to required public disclosure under section 552.022(a) of the Government Code. Section 552.022(a) provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). Thus, if the contents of a submitted document also are a matter of public court record, that document is subject to required public disclosure. We have labeled with green flags the documents that are or may be subject to release under section 552.022(a)(17).

You state that the documents that you submitted as Exhibits "O" and "P" include criminal history record information ("CHRI") that is excepted from public disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. We agree that the district attorney must withhold all CHRI that was obtained from the National Crime Information Center ("NCIC") or the Texas Crime Information Center ("TCIC").² The dissemination of CHRI that was obtained from the NCIC network is governed by federal law. Federal regulations prohibit the release to the general public of CHRI that is maintained in state and local CHRI systems. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.") and (c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself"); *see also* Open Records Decision No. 565 at 10-12 (1990). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See* ORD 565 at 10-12. Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *See* Gov't Code § 411.089(b). Thus, any CHRI generated by the federal government or another state may be disclosed only in accordance with the federal regulations. Furthermore, any CHRI obtained from the Texas Department of Public Safety (the "DPS") or any other criminal justice

²Contrary to what you indicate in your request for this ruling, your Exhibits "O" and "Q" do not consist entirely of criminal history record information that was obtained from the NCIC and TCIC networks. However, as we explain later in this ruling, Exhibit "O" contains information not obtained from the NCIC or TCIC that is or may be excepted from disclosure.

agency must be withheld as provided by subchapter F of chapter 411 of the Government Code.³ Accordingly, any criminal history record information that was obtained from the NCIC or the TCIC is confidential and must be withheld from disclosure pursuant to section 552.101 of the Government Code in conjunction with federal law and subchapter F of chapter 411 of the Government Code.

Regarding other information obtained from the NCIC or TCIC that is contained in your Exhibit "Q," you inquire whether the requestor, as attorney for the widow of the crime victim, has a special right of access under section 552.023 of the Government Code to CHRI relating to the decedent. Section 552.023 provides in relevant part that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." Gov't Code § 552.023(a); *see also* Open Records Decision No. 481 at 5 (1987) (stating that where an individual asks a governmental body to release information concerning only that individual, no common law privacy interest arises, and the individual is entitled to that information if the governmental body can claim no other basis for denying access to it). The laws that govern the dissemination of information obtained from the NCIC or TCIC are based on both law enforcement and privacy interests. *See* Open Records Decision No. 565 at 10-12 (1990). As previously explained, CHRI obtained from the federal government may be disseminated only as permitted by the federal regulations, and CHRI obtained from the DPS or another criminal justice agency may be disseminated only as permitted by subchapter F of chapter 411 of the Government Code. Therefore, the district attorney may not release to the requestor CHRI obtained from the NCIC or TCIC that pertains to the deceased crime victim.⁴

Certain other criminal history information contained in Exhibit "O" also may be confidential under section 552.101 of the Government Code. When a prosecutor or other law enforcement agency compiles or summarizes criminal history information pertaining to a particular individual, the compiled or summarized information takes on a character that implicates the individual's right of privacy in a manner that the same information in an uncompiled state does not. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Thus, section 552.101 requires a law enforcement agency to withhold any criminal history information that it has compiled, and that treats the individual whose criminal history was compiled as a suspect, arrestee, or defendant, because the compilation of

³"Criminal history record information," for the purposes of subchapter F of chapter 411 of the Government Code, does not include either fingerprint records, if they do not indicate the involvement of the fingerprinted individual in the criminal justice system, or driving record information that is maintained by the DPS under subchapter C of chapter 521 of the Transportation Code. *See* Gov't Code § 411.082(2).

⁴We note, however, that Exhibit "Q" also contains non-CHRI records that relate to the crime victim. Those records contain information that would implicate the privacy interests of a living individual. However, constitutional and common law privacy interests lapse upon the death of the individual to whom the information in question pertains. *See* Attorney General Opinion No. H-917 at 3-4 (1976); Open Records Decision No. 272 at 1 (1981). Accordingly, non-CHRI relating to the crime victim may be released to the victim's widow and her attorney.

-- the criminal history has implicated that individual's common law right of privacy. *Id.*; see also Open Records Decision No. 616 at 2-3 (1993). Therefore, under section 552.101 and *Reporters Committee*, you must withhold any such locally compiled criminal history information that involves an individual identified as a suspect, arrestee, or defendant. We have labeled that information.

You also advise us that Exhibit "P" contains medical and mental health records relating to the criminal defendant that you contend are confidential. Chapter 611 of the Health and Safety Code governs mental health records. Section 611.022 of the Health and Safety Code provides in relevant part:

- (a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.
- (b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.
- (c) This section applies regardless of when the patient received services from a professional.

Health & Safety Code § 611.002.⁵ You have not informed us that any of the exceptions referenced in section 611.002(b) is applicable here. Accordingly, the documents that we have labeled as such are confidential under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code and must be withheld from disclosure.

Your Exhibit "P" also contains other personal information pertaining to the criminal defendant that is confidential under section 552.101 in conjunction with the common law right of privacy. Common law privacy protects information if it (1) is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) the public has no legitimate interest in it. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683; see also Open Records Decision No. 659 at 5 (1999). We have labeled the information that the district attorney must withhold under section 552.101 of the Government Code in conjunction with common law privacy.

We also note that Exhibits "O" and "P" contain social security number information that may be confidential under section 552.101 in conjunction with 1990 amendments to the federal

⁵Section 611.001 of the Health and Safety Code defines the terms "patient" and "professional." See Health and Safety Code § 611.001(1), (2).

Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if the information was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990*. See Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security number information in question was obtained or is maintained by the district attorney pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the district attorney to obtain or maintain a social security number. Therefore, we have no basis for concluding that the information in question was obtained or is maintained pursuant to such a statute and is therefore confidential under section 405(c)(2)(C)(viii)(I) of the federal law. We caution you, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Therefore, prior to releasing any of the social security number information that we have labeled in your Exhibits "O" and "P," the district attorney should ensure that the information was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

You seek to withhold the information in your Exhibit "N" under section 552.108 of the Government Code, the "law enforcement" exception. Section 552.108 provides in relevant part:

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

....

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation[.]

Gov't Code § 552.108(b)(3)(A). A governmental body that claims an exception to disclosure under section 552.108 must sufficiently explain, if the responsive information does not do so on its face, how and why section 552.108 is applicable. See *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You describe the information that the district attorney has submitted as Exhibit "N" as "records and/or notations prepared by an attorney in anticipation of or in the course of preparing for criminal litigation." Based on your representation and our review of the submitted documents, we conclude that your Exhibit "N" is excepted from disclosure under section 552.108(b)(3) of the Government Code.

Finally, we note that your Exhibit "O" contains motor vehicle record information whose disclosure is governed by section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from [required public disclosure] if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;

(2) a motor vehicle title or registration issued by an agency of this state; or

(3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

Gov't Code § 552.130(a). We have labeled the motor vehicle record information that must be withheld from disclosure in accordance with section 552.130.

In summary, information that also is contained in a public court record must be released pursuant to section 552.022(a)(17) of the Government Code. The district attorney must withhold, under section 552.101, criminal history record information that was obtained from the NCIC or TCIC; locally compiled criminal history information that identifies an individual as a suspect, arrestee, or defendant; mental health records that are confidential under section 611.002 of the Health and Safety Code; other personal information that is protected by the common law right of privacy; and any social security number information that is confidential under federal law. Information that was prepared by an attorney in anticipation of or in the course of preparation for criminal litigation is excepted from disclosure under section 552.108(b)(3). Motor vehicle record information must be withheld in accordance with section 552.130. The remaining information in Exhibits "N" through "Q" must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

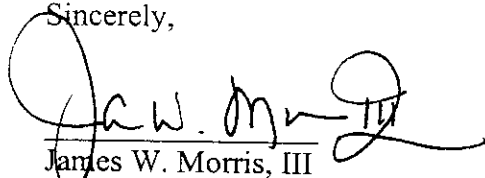
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this

letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in dark ink, appearing to read "J.W. Morris, III", is written over a horizontal line.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ljp

Ref: ID# 136564

Encl. Submitted documents

cc: Mr. Mark B. Chadick
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(w/o enclosures)